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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware Corporation dba BLACKWATER WORLDWIDE, Plaintiff, v. KELLY BROUGHTON, in his capacity as Director the Development Services Department of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO, an agency of the City of San Diego; AFSANEH AHMADI, in her capacity as the Chief Building Official for the City of San Diego; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive, Defendants.	Case No. 08 CV 0926 H (WMC) **DEFENDANTS' RESPONSE TO COURT'S ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION** Date: June 17, 2008 Time: 10:30 a.m. Courtroom: 13 Judge: Hon. Marilyn L. Huff

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Defendants City of San Diego ("CITY"), the City's Development Services Department ("DSD"), Kelly Broughton ("Broughton") and Afsaneh Ahmadi ("Ahmadi") (collectively "City Defendants") hereby submit their response in opposition to Plaintiff Blackwater Lodge and Training Center's *dba* Blackwater Worldwide ("Blackwater") request for an order to show cause ("OSC") why a Preliminary Injunction should not issue following the Court's grant of Blackwater's request for temporary restraining order ("TRO") on June 4, 2008. The City Defendants respectfully submit that the issuance of a Preliminary Injunction that furthers the terms of the June 4, 2008, TRO is unwarranted.

I. INTRODUCTION

On May 23, 2008, Blackwater filed its complaint against the City, DSD, the City's Director of DSD, Broughton, and Afsaneh Ahamadi, the City's Building Official ("BO"). On May 27, 2008, Blackwater made application to this Court for a temporary restraining order ("TRO") contending Blackwater would suffer irreparable harm if it was not able to begin use of a warehouse located at 7685 Siempre Viva Road ("Otay Mesa Facility") in the City's planned Otay Mesa Development District ("OMDD") to train U.S. Navy personnel in "Security Reaction Forces" training. Compl.¶¶ 1, 16-20; Decl. of Bonfiglio ISO Ex Parte App. For TRO ("Bonfiglio Decl.") Security Reaction Forces Training includes training in the use of deadly force with 9-mm pistols, shotguns, and M16 rifles. This course is designated by the Navy as "HIGH RISK"—its primary focus is the combat of terrorist attacks. Decl. of Julio DeGuzman ISO Defendants' Response to OSC. ("DeGuzman Decl."¶14) Blackwater, however, claims it is not engaged in high risk military, or para-military, training. Rather, Blackwater contends it is simply planning to operate a "vocational school" in the warehouse.[1]

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[1] Although the City possesses no evidence to authenticate or dispute Blackwater's actual authority to provide training to law enforcement officers, it has been noted in reported cases to have provided like services. Specifically, in *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006), several individuals "entered into independent contractor service agreements with Blackwater Security Consulting, L.L.C., and Blackwater Lodge and Training Center, Inc., (collectively, "Blackwater") to provide services in support of Blackwater's contracts with third parties in need of security or logistical support." *Id.* at 580. The court also noted that Blackwater provided security to ESS Support Services Worldwide, which had an agreement with the defense contractor firm Kellogg, Brown & Root, which, in turn, had arranged with the United States Armed Forces to provide services in support of its operations in Iraq. *Id.*

On May 19, 2008, Broughton, in his capacity as the DSD Director, notified Blackwater that DSD would not issue a certificate of occupancy for the warehouse as a military, or para-military, training center until Blackwater properly applied to the City for a "change of use" for the building from an industrial warehouse as required by the San Diego Municipal Code ("SDMC") and more particularly, as required by the City's OMDD regulations. Brock Decl., Ex.A. The Otay Mesa Facility is owned by Safchild Investment LLC and was previously used exclusively as a warehouse. Brock Decl., Ex.B. More recently, however, the City's DSD processed a series of building permits, submitted by various entities or agents for the property owner for what appeared to be relatively routine and minor modifications to the warehouse, including installation of 44 feet of office partitions, air conditioning units, and exhaust fans. Decl.Ahamadi ¶¶ 2-4.

As noted by the Court in its Order Granting Plaintiff's Application for Temporary Restraining Order ("TRO Order"), the two initial building permits at issue were submitted by Southwest Law Enforcement Training Enterprises ("SLETE"). Blackwater's Vice President has asserted "Blackwater initially decided to enter into a joint venture with a partnership named [SLETE], because of its capabilities." Bonfiglio Decl., ¶10. However, as the Court noted, such applications submitted by or on behalf of SLETE did not propose any specific change in use for the warehouse. TRO Order 2,: 22-25; 3: 5-8.

In February 2008, a business entity named "Raven Development Group" made application to add an "indoor firing range," stating the Otay Mesa Facility was going to be used as a "training facility." Bonfiglio Decl., ¶11; Ahmadi Decl., ¶4, Ex. C. At the time, no mention was made of a replica ship bulkhead training simulator ("Ship Bulkhead") which, the City later learned was planned to occupy over 80% of the warehouse floor space. In fact, the building permit application for the Ship Bulkhead was not submitted to the City's DSD until May 28, 2008, well after Blackwater's action was filed against the City. Ahmadi Decl., ¶5. The permit for the Ship Bulkhead and use of the Otay Mesa Facility for military, or para-military training, has not yet been processed by the City's DSD. Ahmadi Decl., ¶¶ 5-9. The only pending City permit is one for a simulator, however, that permit is far from attaining City approval. See Ahmadi Decl.,¶5; DeGuzman Decl., ¶20; Ex.E.

Notwithstanding Blackwater's tardy application for use of the Otay Mesa Facility for Security Reaction Forces military training, as early as February 2008, Blackwater knew its primary business activity in the Otay Mesa Facility would be for Navy security training, not simply a shooting range or vocational school. In fact, On February 6, 2008, Blackwater filed a business tax certificate as a pre-requisite to conducting business within the City, indicating its primary business activity would be "…conduct[ing] security training for the United States Navy." Blackwater specifically mentioned its contract with the Navy at that time. DeGuzman Decl. ¶ 8, Ex.A. Therefore, despite Blackwater's attempt to characterize the City Defendants' actions as being politically motivated, the truth is that what began as relatively minor building improvement approvals, transformed into substantial building modifications and a significant change of use. Had there been greater transparency by Blackwater, the additional project review now contemplated by the City would have been triggered earlier. Blackwater's lack of transparency should neither be rewarded, nor its impact on the position Blackwater finds itself in, disregarded.

The City respectfully submits that as a matter of local land use law, the City has an absolute right to evaluate, under the totality of the circumstances, any change of use of the Otay Mesa Facility from an industrial warehouse to a military, or para-military, training center. The conscious, piecemeal attempts by Blackwater to secure the change of use of the Otay Mesa Facility by a series of "ministerial" non-discretionary building permit applications has had the effect, whether intended or not, of effectively subverting the City's legitimate land use review processes. As such, the City respectfully contends when the totality of the facts and circumstances are adequately considered in this case, it will become apparent that Blackwater is not likely to succeed on the merits of any of its claims, precluding the issuance of a Preliminary Injunction.

II. ARGUMENT

BLACKWATER IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. Blackwater Has Not Met its Burden for Issuance of a Preliminary Injunction

To prevail on a motion for preliminary injunction, Plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) in certain cases, advancement of the public interest. *See*, *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir.2004); *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Alternatively, injunctive relief can be granted if a plaintiff "demonstrate[s] ... a combination of probable success on the merits and the possibility of irreparable injury." *Id.* Because a preliminary injunction is an extraordinary remedy, the movant must carry its burden of persuasion by a "clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Furthermore, Plaintiff also must satisfy the general equitable requirements above by showing that legal remedies are "inadequate." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F2d 935, 937 (9th Cir. 1987).

These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases – if Plaintiffs cannot show a chance of success on the merits, the injunction should not issue. Plaintiffs ***must*** demonstrate a fair chance of success on the merits, or questions serious enough to require litigation. *Department of Parks & Rec. v. Bazaar Del Mundo Inc.*, 448 F3d 1118, 1123 (9th Cir. 2006). "Serious questions" have been interpreted to mean questions that involve a fair chance of success on the merits that cannot be resolved at the hearing on the injunction, "and as to which the court perceives the need to preserve the *status quo* lest one side prevent resolution of the questions or execution of any judgment by altering the *status quo*." *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, (9th Cir. 1999) 179 F3d 725, 732; *Republic of Philippines v. Marcos*, (9th Cir. 1988) 862 F2d 1355, 1362. *Also see*, *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005); *Nike, Inc. v. McCarthy*, 379 F.3d 576, 580 (9th Cir. 2004).

Thus, Blackwater must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury, or a serious question going to the merits of its case, such that when the Court balances the hardships, the balance favors Blackwater. *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998); *First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1381 (9th Cir. 1987); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810 (9th Cir. 2003). However, in cases where a party seeks to enjoin public officials, "principles of equity . . . ***militate heavily against the grant of an injunction*** except in the most extraordinary circumstances." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (Emphasis added). Furthermore, speculative injury does not constitute irreparable harm. *See Caribbean Marine Servs. Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir.1988); *Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 472 (9th Cir.1984). Therefore, Blackwater must show that all legal remedies are "inadequate." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F2d 935, 937 (9th Cir. 1987).

Defendants contend the City's land use review processes provide Blackwater with an adequate remedy at law. Blackwater simply refuses to comply with California land use laws, attempting instead to turn a local land use dispute into a federal case.

1. Blackwater Is Not Likely To Succeed On The Merits Of Its Claims At Trial

The Court correctly concluded in its TRO Order that Blackwater is, at base, challenging the application of municipal land use law to Blackwater's proposed use of the Otay Mesa Facility as a military, or para-military, training center. TRO Order 6:10-11. For this reason, the City Defendants respectfully submit that the City, as a local governmental agency, should first be permitted the full authority to exercise its police power to adequately review and regulate land use within the City to protect the public health, safety and welfare of its residents. *Berman v. Parker* 348 U.S. 26, 32-33 (1954). A land use regulation lies within the police power of the local governmental agency if it is reasonably related to the public welfare. *Associated Home Builders, Inc. v. City of Livermore* 18 Cal.3d 582 600-601 (1976). This police power is set forth in the California Constitution, which unambiguously confers on all cities within the State the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. ***This has not yet occurred in this case.***

As the City Defendants vigorously objected in its opposition to the Plaintiff's request for a TRO, before the federal district court steps in to regulate land use within a sovereign state under a due process or equal protection claim, the local authority must be permitted to take final action on the matter so that the court can judge whether the local authority's position was arbitrary. *See Strickland v. Alderman* 74 F.3d 260 (11th Cir. 1996); *Landmark Land Co. of Oklahoma v. Buchanan* 874 F.2d 717 (10th Cir. 1989). The error here is that the City, as the local governmental body, ***has not yet taken that final action.*** The City has not had the opportunity to adequately review the proposed change of use from industrial warehouse to a military, or para-military, training center for the Otay Mesa Facility. It has not had the opportunity to fully evaluate the pending building permit for the Ship Bulkhead training simulator which represents over 80% of the floor space of the Otay Mesa Facility. Ahmadi Decl., ¶¶5-9. Clearly, the issue of an adequate review of the "change of use" of the building has not been legitimately vetted in accordance with the City's land use regulations.

2. The Preliminary Injunction Does Not Preserve the Correct *Status Quo*.

The basic function of a preliminary injunction is to preserve the *status quo* pending a determination of the action on the merits. *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir.1988). The TRO Order does not preserve the status quo as the *status quo* existed prior to the time Plaintiff initiated this litigation. The *status quo* at that time was a state in which Blackwater had been notified by the City that further discretionary review processes associated with the use of the building for vocational/trade school purposes was needed; and that "no other uses [would be] permitted until a submission for a request of change in occupancy [had] been made and approved by Development Services." Brock Decl.; Ex. A.

B. THE CITY IS ENTITLED TO DETERMINE WHETHER THE BLACKWATER PROPOSED MILITARY TRAINING CENTER IS A PERMITTED USE WITHIN THE CITY'S OTAY MESA PLANNED DEVELOPMENT DISTRICT

Under the San Diego Municipal Code ("SDMC"), the Otay Mesa Facility is governed by the City's Planned District laws, and more specifically, the Otay Mesa Development District Ordinance ("OMDD"). SDMC §1517.0101 *et. seq.* The purpose of the OMDD Ordinance is "to create and promote the development of the City's largest and most significant industrial area of the City, and to control the use and development of the City's center near the U.S./Mexican border crossing for manufacturing, wholesaling, distribution, assembly operations, and related support services." SDMC§ 1517.0101. Under the OMDD, a building permit for conversion or alteration of an exiting industrial warehouse building cannot be issued until an application has been submitted stating the ***actual intended change of use for the entire facility.*** SDMC§1517.0201(a)(2).

No where in the SDMC, or in the OMDD, is there a provision that allows an applicant to make piecemeal applications for portions of a building and, thereby avoid a full and complete evaluation of the new use of a building within the City's land use regulatory authority. A project may only be approved by a "Process One" (ministerial approval process), where the entirety of the project is in complete compliance with the subdistrict use designation assigned to the property by the OMDD. SDMC §1517.0202(a). This means the project must comply with §1517.0204 (Financing of Public Facilities), §1517.0301(Permitted Uses), and §1517.0305 (Property Development Regulations). SDMC§1517.0202(a)(2). None of these requirements have been adequately evaluated by the City yet, given the ***actual intended use of the building*** as a military, or para-military, training center. Ahmadi Decl., ¶¶5-9.

Blackwater has asserted, and the Court has accepted as correct, that "no permit is needed to operate a vocational/trade school" within the OMDD "since such uses are permitted as a matter of right." TRO Order 7:17-18. However, this is not true. Permitted uses within the OMDD Industrial Subdistrict where the Otay Mesa Facility is located includes all of the industrial uses set forth in SDMC §1517.0301, as well as permitted uses in the City IH-2-1 zone. See SDMC §131.0615, Table 131-06A. The IH-2-1 zone does, in fact, include a brief reference to "vocational/trade" school. SDMC§131.0622, Table 131-06B. However, a "trade school" as defined by the OMDD means a school "instructing in subjects related to a use permitted within the [industrial] subdistrict." SDMC §1517.0301(a)(8)(A).

Certainly, military, or para-military, training center instructing in "High Risk" activities is not an industrial "trade school" within the meaning of the OMDD. Whether it is a "vocational school" within the meaning of the California law and the SDMC, has yet to be ascertained. The City's governing body should not be arbitrarily denied its right to decide this critical application of State and local law.

C. IN CALIFORNIA, MILITARY TRAINING OPERATIONS INSTRUCTING THE ARMED FORCES OF THE UNITED STATES ARE NOT SECURITY SERVICE "VOCATIONAL SCHOOLS"

Based on numerous assumptions made thus far, Blackwater arbitrarily concluded, and this Court agreed, that Blackwater's proposed use of the Otay Mesa Facility is a valid "vocational" use within the OMDD, the grant of a permit for which simply a ministerial mandatory, non-discretionary act to be performed by the City as a matter of law. TRO 7: 13-20. However, nothing could be further from the truth.

In California, security and investigative "vocational" school are regulated by the Bureau of Security and Investigative Services. Calif. Bus.& Prof. Code §7583.6(b). Any course of skills training for "registered security guards" must follow the standards prescribed by §7583.6(b) of the California Business and Professions Code, and follow the course description set forth in California Code of Regulations Title 16 Division 7 Bureau of Security and Investigative Services Article 9 Skills Training Course for Security Guards. 16 Cal.Code Regs.§643. The Appendix to 16 Cal Code Regs §643 sets forth the mandatory outline of topics that must be taught for a Security and Investigative Services course within the State. Notably, a Security and Investigative "vocational school" in California does not instruct in "High Risk" U.S. Navy SPF training. No where in California's implementation regulations for Security and Investigative Service "vocational" schools is High Risk military, or para-military, training discussed.

Further, if the Preliminary Injunction is issued, the Court will effectively have usurped the power of the City and will have prohibited the City from making a full and proper evaluation of the Blackwater's "vocational school" project and its actual compliance with the OMDD based on the totality of the circumstances. The City should not be arbitrarily denied the right to properly evaluate the nature and effect of Blackwater's military, or para-military, training school within the OMDD industrial zone.

Blackwater knew as early as February 2008 that it would be conducting the Navy Security Reaction Forces Training within the City pursuant to a contract with the Navy. DeGuzman Decl., ¶8; Ex.A. It was Blackwater that chose to process its request for a change of use within the City's OMDD without adequately disclosing the full nature of its intended use of the Otay Mesa Facility. Blackwater's lack of disclosure is notable, if not odd. In fact, the Court acknowledges the curiously piecemeal fashion in which Blackwater has presented its proposed "change of use" for the Otay Mesa Facility to the City:

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> "Plaintiff's application for a TRO focuses ***only on*** Plaintiff's ability to use the 'portions of the building identified for use as a shooting range and vocational/trade school," which was the subject of the May 19, 2008, letter from the director of the City's Developmental Services Department…." The Court duly notes that subsequent to the commencement of this action, Plaintiff filed a permit application relating to a ***partial replica of a ship bulkhead necessary for the training Plaintf seeks to provide to Navy sailors….that permit application…remains pending.*** " (TRO Order7:fn 2:23-27, emphasis added.)

Interestingly, the Blackwater building permit application for the Ship Bulkhead (another piecemeal ministerial permit request) asks permission to allow the addition of an amusement park "simulator/ride" within the Building--not a full-scale ship replica for military, or para-military, training purposes. Ahmadi Decl, ¶ 5; DeGuzman Decl., ¶20; Ex. E. The City respectfully contends it should be allowed the opportunity to evaluate the full intended use of the Otay Mesa Facility by Blackwater, not merely the piecemeal, seemingly innocuous, building permit applications for minor additions to the structure. The use of the Otay Mesa Facility will be changed, and the City has a right to evaluate that change.

Indeed, in the Ninth Circuit, courts often have held that land-use planning questions "touch a sensitive area of social policy" into which the federal courts should not lightly intrude. *See, e.g., Bank of America v. Summerland County Water Dist.,* 767 F.2d 544, 546 (9th Cir.1985); *Kollsman v. City of Los Angeles,* 737 F.2d 830, 833 (9th Cir.1984), *cert. denied,* 105 S.Ct. 1179 (1985); *C-Y Development Co. v. City of Redlands,* 703 F.2d 375, 377 (9th Cir.1983); *Santa Fe Land Improvement Co. v. City of Chula Vista,* 596 F.2d 838, 840 (9th Cir.1979); *Sederquist v. City of Tiburon,* 590 F.2d 278, 281 (9th Cir.1978); *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, 1094-1095 (9th Cir.1976).

D. THE CITY HAS THE AUTHORITY TO REQUIRE FURTHER LAND USE APPROVALS BEFORE THE BLACKWATER MILITARY TRAINING FACILITY MAY OPEN IN THE OTAY MESA DEVELOPMENT DISTRICT

Based on the now-obvious change of use intended by Blackwater for the Otay Mesa Facility, it is within the City's municipal authority to require additional discretionary approvals before a project can proceed. See SDMC§§ 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10) and 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and

111.0205. In his letter of May 19, 2008, Broughton, the City's Director of DSD exercised his discretion under SDMC §§ 111.0205, 131.0110(a) and 1517.0301(c)(2) to submit the Blackwater military, or para-military, training project to further land use discretionary review. As expressly stated in SDMC § 121.0308, the issuance of a construction permit does not grant a person a right to violate other laws:

> (a) The issuance or granting of [a]...*construction permit* or any plan, specifications, computations, or inspection approval does not constitute a permit for, or an approval of, any violation of any of the provisions of the Land Development Code, including the Building, Electrical, Plumbing, or Mechanical Regulations or any other ordinance of the City. *Development permits*, *construction permits*, or inspections presuming to give authority to violate or cancel the provisions of the Land Development Code, Building, Electrical, Plumbing, or Mechanical Regulations or other ordinances of the City ***are not valid***.
>
> (b) The issuance of a ... *construction permit* based on plans, specifications, and other data ***does not prevent*** the City Manager from subsequently requiring the correction of errors in the plans, specifications, and other data or ***the Building Official from stopping building operations*** that are in violation of the Land Development Code or any other applicable law.

SDMC§121.0308(a),(b), emphasis added.

The City's BO reports to the Director of DSD and operates under the delegation of authority specified in the City's Land Development Code and other Municipal Code provisions. Specifically, the BO oversees the issuance of building and construction permits for the City. Pursuant to the SDMC, the BO is charged with interpreting the City's Land Development Code. SDMC Section 129.0104(a)(4). The City's BO is also charged with approving and issuing construction permits (such as the "building permits" at issue herein) that comply with the City's Land Development Code provisions. SDMC 129.0104(a)(3).

The City's BO is also charged with the duty to request and receive the assistance and cooperation of other City officials in carrying out these duties. SDMC 129.0104(a)(10.) The Building Official performs her duties within the constructs of the SDMC, including the provision requiring discretionary permit approval, if necessary, before the issuance of any building permit. As in this case, the BO may determine that a building site does not comply with other applicable

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regulations of the SDMC, notwithstanding the fact that the general application made for the permit was initially thought to be "ministerial." SDMC 129.0111(d); Ahmadi Decl., ¶¶5-9.

It is fully within the scope of the BO's duties to seek out assistance from other City officials where needed before issuing certificates of occupancy or before issuing permits. This is not unusual and Blackwater has not demonstrated otherwise. *See*, SDMC §§ 112.0103, 131.0620(e), 129.0111(d), 131.0110(a), 131.0110(c), 129.0104(a)(10), 1517.0301(c)(2), 128.0201, 128.0202(c), 128.0207 and 111.0201. Furthermore, the Broughton letter to Blackwater apprising Blackwater that further evaluation of the project is warranted for the proposed change of use in no manner rises to the deprivation of a federally protected property right.

E. BLACKWATER HAS NOT BEEN DENIED A PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW

Blackwater has argued that the City, by requiring further review of Blackwater's military, or para-military, training project in the OMDD, deprived Blackwater of a protected property right without notice and an opportunity for a hearing appropriate to the nature of the case. In its TRO the Court agreed, finding "a strong likelihood of success on this claim." TRO Order10:1-2. The City, however, respectfully contends the nature of the City's land use permit processes have been gravely misunderstood and misapplied in this instance. Any further process required by the City to evaluate the land use in question does not deprive Blackwater of due process; rather, it ***affirmatively provides Blackwater with full due process under the law.***

When the totality of the circumstances are considered it should become apparent and the City determined Blackwater's intended use for the Otay Mesa Facility warranted further review because it may significantly deviate from the OMDD land use regulations and it did not deny Blackwater due process--nor was Blackwater treated differently under the law. Such a determination simply means Blackwater may be required to apply for and obtain a different, more specific, OMDD permit. *See, e.g.*, SDMC §§1517.0202(b), 1517.0203. An OMDD permit requires a "Process Three" evaluation [SDMC§1517.0203(c)], rather than a "Process One, and is evaluated as any other "Site Development Permit" would be evaluated within the City. *See*, SDMC§§1517.0203(a), 1517.0201(c).

The required findings will be the same as those for all Site Development Permits within the City [SDMC§126.0504(a)], plus possible supplemental findings required by the OMDD planned district regulations [SDMC§1517.0201(c)]. The supplemental findings in the OMDD are 1) that the proposed use of the Otay Mesa Facility meets the purpose and intent of the OMDD ordinance and the Otay Mesa Community plan [SDMC§1517.0203(c)(2)]; 2) that the proposed use of the Otay Mesa Facility will not be detrimental to the health safety and welfare of the City [SDMC§1517.0203(c)(3)]; and 3) that the proposed use will comply with relevant regulations in the San Diego Municipal Code. SDMC §1517.0203(c)(4). The "Process Three" evaluation may be appealed to the City's Planning Commission. SDMC§1517.0203(g). Furthermore, the Planning Commission can ultimately determine, under all circumstances, that the use is similar enough in character to the uses enumerated in the OMDD and are within its intent and purpose, such that the use shall be allowed. SDMC§1517.0301(c)(2).

It is clear from the facts in this case, that the City's permitting process has proceeded in a piecemeal fashion, with the result that the intent of the OMDD Ordinance has been effectively subverted.[2] As the Director of DSD indicated in his May 19, 2008 letter, curiously, the majority of the Otay Mesa Facility (approximately 50,000 sq. feet) is still identified for warehouse uses. It is, therefore, fully within the Director's discretion under the SDMC not to allow any other use until the appropriate change in use and occupancy has been determined, evaluated and approved by DSD.

F. BLACKWATER HAS NOT DEMONSTRATED IRREPARABLE HARM NOR A BALANCE OF HARDSHIPS THAT TIPS IN FAVOR OF THE ISSUANCE OF A PRELIMINARY INJUNCTION

Blackwater contends, and the Court has initially determined, that Blackwater faces the threat of irreparable injury in the absence of interim injunctive relief because it will be prevented from utilizing the Otay Mesa Facility for military training for the U.S. Navy. TRO Order 11:11-21. However, as set forth above, ***Blackwater has not yet secured the right*** to use the Otay Mesa

[2] For purposes of this brief, it need not be asserted, nor determined, that Blackwater's piecemeal approach was a deceptive course of action aimed at pushing the necessary permit approvals through the City permit process in an inconspicuous and expedited fashion.

Facility as a military, or para-military, training center. Blackwater's contract with the Navy was awarded and made effective on May 28, 2008. The majority of the contract calls for training in Norfolk, Virginia and only calls for a two 3-week "Security Reaction Forces" ("SRF") training class for up to 24 students to be conducted from June 2 to June 20, 2008, and from June 30 to July 18, 2008, in San Diego. The total contract value is $813,461.66, a minor fraction of which is for the two trainings in San Diego (total value of which is $134,782). Brock Decl., Ex.C.

The Court should note that on the effective date of the contract, May 28, 2008, Blackwater had not yet submitted an application to use any part of the Otay Mesa Facility neither for the Navy Ship Bulkhead, nor for the majority of the Otay Mesa Facility where the Ship Bulkhead is located, for Navy military training. In fact, Blackwater has conceded and admits it ***still has not yet received any use permit*** for this purpose. TRO Order 7:23-27. Blackwater's failure to secure proper land use entitlements to use the Otay Mesa Facility for Navy SRF training prior to the training commencement date under the contract is not "irreparable harm" for which the City should be held responsible. The consequence of Blackwater's tardy action rests squarely on Blackwater's shoulders. There is adequate evidence in the record that with proper planning, the Navy SRF training could have been conducted elsewhere within San Diego.

1. Blackwater Cannot Prevail On A Claim For Recover Of Money Damages Against Defendants Without Strict Compliance With The California Government Claims Act

As indicated above, this action involves a land use matter that should be left considered and resolved at the local level. Even if the matter involved a federal question, a preliminary injunction is inappropriate because a remedy at law exists. In fact, Blackwater admitted, on the record, that there was an adequate remedy for money damages should Blackwater prevail. Transcript of TRO hearing, May 30, 2008, pp. 40:17–41:9.[3] Furthermore, to succeed on any claim for money damages against public entity or a public employee in the State of California on the basis of acts or omissions in the scope of their official duties, a party must plead and prove that they have timely filed a claim with the public entity employer pursuant to the California Government Claims Act ("Claims Act"). Failure to allege specific compliance with the

[3] The Court is respectfully requested to take judicial notice of its own files and records in this action.

requirements of the Claims Act is an affirmative defense for the public entity and its employees and renders any such claim subject to dismissal as a matter of law. *Briggs v. Lawrence* (1991) 230 Cal.App.3d 605.

The Claims Act provides that no suit for money or damages may be maintained against a California public entity unless a formal claim has been presented to, and rejected by the public entity. Cal.Gov. Code §§ 910, 912.4, 912.8, 945.4. If the public entity gives proper notice of rejection, the suit must be commenced within six months after delivery or mailing of the notice of rejection. Cal. Gov. Code §945.6(a)(1). This applies both to suits against the public entity and to suits against the public employees whose acts are the subject of the claim involved. *Massa v. Southern Cal. Rapid Transit Dist.* (1996) 43 Cal.App.4th 1217, 1222.

Therefore, the timely filing of a claim under the Claims Act is an essential element of a claim for relief against the City and its employees under California law. *Wood v. Riverside General Hospital* (1994) 25 Cal.App.4th 1113. As a matter of California law, therefore, Blackwater is barred from maintaining any action against the public entity defendants in this matter. *Miller v. United Airlines, Inc.* (1985) 174 Cal.App. 3d 878, 890. Therefore, at this point in time, it cannot be seen as likely to succeed on a claim to recover money damages in this action.

For all the reasons stated, the City respectfully submits Blackwater has failed to convincingly show a likelihood of success on the merits, the possibility of true irreparable injury, or that any balance of harm tips sharply in the Blackwater's favor warranting grant of the preliminary injunction sought here. *See*, *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 700, 701 (9th Cir. 1997); *Oakland Tribune, inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985).

2. **Public Interest Does Not Favor Grant Of The Preliminary Injunction And, In Fact, Mandates Its Denial**

It has long been a principle of California land use law that land use regulation is an exercise of the State's police powers, including the power to zone or regulate specific land usage. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785, 800; *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 159. Therefore, all land-use decisions must be consistent with the general land use plans and local plans. *Families Unafraid to Uphold Rural v. County Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336; *Corona Norco Unified School Dist. V. City of Corona* (1993) 17 Cal.App. 4th 985, 994. This consistency requirement has been described as "the linchpin" of California's land use and development laws; it is the principle, which infused the concept of planned growth with the force of law. *deBottari v. City Council* (1985) 171Cal.App.3d 1204, 1213; accord, *Families Unafraid, supra,* 62 Cal.App.4th at 1336. A project is consistent with the applicable land use plans only if it is "compatible with the objectives, policies, general land uses, and programs specified in such a plan." Cal.Gov.Code §66473.5; *Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal. App.4th 342, 378.; *Sequoyah Hills Homeowner's Assn. v. City of Oakland* (1993) 23 Cal. App. 4th 704, 717-718.

Stated differently, a project must always be "in agreement or harmony with" the general and local plans. *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App. 3d 391, 406; accord, *Sequoyah Hills Homeowner's Assn. v. City of Oakland, supra.,* at p. 718. The match need not be exact in terms of the land use designation, and the project need not be in perfect conformity with underlying objectives. *San Francisco Upholding the Downtown Plan v. City and County of San Francisco* (2002)102 Cal.App.4th 656, 678; *Sequoyah Hills Homeowner's Assn., supra,* 23 Cal. App. 4th at 717-72. Significantly, the local government must be permitted to review a proposed land use in light of all applicable local land use laws to make a sufficient determination. In this case, public policy clearly tips in favor of allowing the City the opportunity to exercise local land use consistency review of Blackwater's proposed use of the Otay Mesa Facility as a military, or para-military, training facility in the OMDD industrial subdistrict.

It is also important to understand that there is no evidence before this Court that the City will act with prejudice when assessing Blackwater's permits. At the end of the day, after the process is complete, Blackwater may very well have their applications approved and receive every permit requested. Rather, the City continues to aggressively defend its right to partake in its local review process without giving in to the strong-arm tactics of a company with friends in high places.

III.

CONCLUSION

As the U.S. Supreme Court has explained:

> [T]he Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' ... or interferes with rights 'implicit in the concept of ordered liberty,' ... When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.... This requirement has traditionally been referred to as 'procedural' due process."

United States v. Salerno 481 U.S. 739, 746 (1987). The Fourteenth Amendment further provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law...." Nonetheless, before any court reaches a question about the fairness of a particular proceeding under the federal Constitution, it must first address whether a protected interest-- life, liberty, or property interest -- ***is actually implicated.*** If no such interest is involved, then the procedural protections of the due process clause do not come into play. *Board of Regents v. Roth* 408 U.S. 564, 569-578 (1972).

Many federal courts have cautioned against applying 42 USC §1983 to local land use disputes. The Fourth Circuit Court of Appeals has aptly noted that the regulation of land is a fundamental legal tool for municipal guidance of land development, and is a core function of local government. Section 1983 does not empower a federal court to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every ' "run of the mill dispute between a developer and a town planning agency." '... In most instances, therefore, decisions regarding the application of … zoning ordinances, and other local land use controls properly rest with the community that is ultimately and intimately-affected." *Gardner v. Baltimore Mayor & City Council,* 969 F.2d 63, 67-68 (1992).

The U.S. Supreme Court has also clearly stated that to have a cognizable "property interest" for due process purposes, a person must have more than an abstract need or desire for it. It must be more than a unilateral expectation. It must be a legitimate claim of entitlement. Property interests are not created by the Constitution. Rather they are created and defined by an independent source such as state law creating actual entitlement to those benefits. *Board of Regents v. State Colleges v. Roth, supra,* at p.68. 408 U. S. 564 (1972)

A legitimate claim of entitlement to a land use permit or approval turns on whether, under state and municipal law, the local agency has some measure of discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency for discretionary review, as in this case, defeats the claim of a property interest. A cognizable property interest exists only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured. *Bateson v. Geisse*, 857 F2d 1300, 1303, 1305 (9th Cir. 1988).

This standard "appropriately balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior. The standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government -- not by federal courts. It also recognizes that the Fourteenth Amendment's Due Process Clause does not function as a general overseer of arbitrariness in state and local land use decisions *Gardner v. Baltimore Mayor & City Council, supra,* 969 F.2d at 69. In this case, the City has not denied Blackwater permission to use the Otay Mesa Facility for military, or para-military, training purposes. It has simply stated the City needs adequate time to review the requested deviation from the OMDD industrial subdistrict regulations and make the appropriate determination. The piecemeal manner in which Blackwater chose to seek City land use review cannot be the fault of the City. Rather, the City has an absolute right under State law to review the proposed use and to set any conditions upon such use as it deems appropriate.

Furthermore, Blackwater has the opportunity for a full due process review of the proposed use under the SDMC's "Process Three" hearing procedures with appeal to the City's Planning Commission, if necessary. The City should not, and cannot, be held responsible for Blackwater's tardy compliance with the City's land use regulations, either in the name of "national security" or any other pretenses Blackwater has advanced.

/ / /

Defendants respectfully submit that Blackwater has failed to meet its burden to convincingly demonstrate it is "likely to succeed" on the merits of any of the claims it asserts in this action. Further, any threat of irreparable harm to Blackwater in this matter is occasioned solely by Blackwater's tardy application for a change of use for the Otay Mesa Facility too close to a date Blackwater chose to commit to train sailors in San Diego. The City cannot be held responsible for Blackwater's lack of timing and lack of diligence.

In balancing the hardships, it is clear that the public's right to fairly regulate land use decisions within in the City tips ***in favor of the City*** and not in favor of allowing special dispensation to a permit applicant that bends the rules, unilaterally redefines the meaning of a "vocational school" within California, and waives the banner of military necessity to summarily avoid all land use rules within the City.

Therefore, the City respectfully requests Blackwater's request for a Preliminary Injunction be denied.

Dated: June 9, 2008

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